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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 139) is reported in 64 F. (2d) 566.

JURISDICTION

The judgment sought to be reviewed was entered April 10, 1933. (R. 144.) Petition for rehearing was denied June 19, 1933. (R. 144.) Petition for certiorari was filed August 14, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the contents of a letter from a husband to his wife, which letter was dictated to a stenographer, may be received in evidence against him.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Washington under an indictment charging him with using the mails to defraud in the promotion of a mining company. (R. 1, 53.) He was sentenced to serve four years on each of four counts of the indictment, the sentences to run concurrently. (R. 58.) All the evidence is not incorporated in the record. (R. 128.) On appeal, the judgment of conviction was affirmed. (R. 144.)

ARGUMENT

Petitioner's contention that his stenographer could not testify to the contents of the letter which he dictated to his wife would seem to require abrogation of the rule that one overhearing an otherwise confidential communication may testify to such communication.

The only portion of the letter which is here material reads as follows (R. 92):

> * * * I talked to a banker the other day; he said "You have done as much as most people do in two years." He says "It is a hard time to break in," but I am going to break in and whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar. * * *

The Circuit Court of Appeals appears to have gone deeply into the subject, and we, therefore, present here its conclusions (R. 139–142):

We think it clear that the statement of the husband to his stenographer is not privileged even though it was intended to be communicated to his wife. The law protecting a spouse from the testimony of the other spouse does not extend to oral communications to third persons, even if intended for transmission to the other spouse. Appellant cites no case to the contrary. The quotation in the brief from *Hammons* v. *State* (Ark.), 84 S.W. 718, seems to support appellant's contention, but an examination of the case discloses that it tends to support the ruling of the trial court in the case at bar. That court said:

"The authorities are practically agreed that when a conversation between husband and wife is overheard, it may be testified to by the third party." Citing, 1 Greenleaf on Evidence, § 254; *Comm.* v. *Griffin,* 110 Mass. 181; *Fay* v. *Guynon,* 131 Mass. 31; *Allison* v. *Barrow,* Tenn. 91 Am. Dec. 291; *State* v. *Center,* 35 Ft. 378; *Griffin* v. *Smith,* 45 Ind. 366.

It is also held that a conversation is not privileged when made in the presence of third persons, citing *Reynolds* v. *State* (Ind.), 46 N.E. 31; *Mainard* v. *Beider,* 2 Ind. App. 115; Robbs Appeal, 98 Pa. 501.

The case at bar was tried in the United States District Court for the State of Washington, and in the absence of Federal legislation upon the subject the law of the territory of Washington at the time of her admission into the Union as a state controls

in the trial of criminal cases in the Federal courts sitting therein. *Rendleman* v. *U.S.*, 18 F. (2d) 27; *Olmstead* v. *U.S.*, 277 U.S. 438, 466–7, 469; *Tinsley* v. *U.S.*, 43 F. (2d) 890, 895.

The statute of the territory of Washington on the subject of privileged communications between husband and wife was contained in §392 of the Code of 1881 and is now embodied in Hill's Statutes and Codes of Washington, §1649. It was derived from a similar code section in the State of California (Cal. Code Civ. Proc., §1881). That section of the California Code has been adopted in substantially the same form in all the states in this circuit (Oregon, §733 Ore. Laws 1920; Arizona, §4412 Struckmeyer's Rev. Code 1928; Nevada, §5424 Rev. Laws Nevada, 1912; Idaho, §7937, Idaho Comp. Stats. 1919; Montana, Rev. Code Mont. 1921, §10,536), and it has been uniformly held that the privilege does not extend to oral communications to third persons nor to written communications entrusted to or coming into the hands of third persons. With reference to these code sections thus adopted by the State of Oregon the Supreme Court of that state in *State* v. *Wilkins*, 72 Ore. 77, while recognizing that some courts have held that a written communication from the husband to the wife should be excluded as privileged "no matter into whose possession the communication, if in writing, may fall," also held that the authorities all agree that if oral communications between husband and wife were over-

heard by third parties they may be given in evidence by the third party. The court also declined to follow the decisions of other states holding that the privilege extended to a writing between them which had come into the possession of third parties and decided that the purpose of the rule was to protect the speaker or writer from the testimony of the other spouse and that the privilege does not extend to communications when disclosed to strangers. The same view was expressed by the Supreme Court of the State of Washington in an earlier case, *State* v. *Nelson,* 39 Wash. 221. In *State* v. *Falsetta,* 43 Wash. 159, it was held that the rule concerning privileged communications between husband and wife had no application to the testimony of a third person who overheard such communication. (See also *State* v. *Rasmussen,* 125 Wash. 176.) The same rule has been followed in California (*People* v. *Chadwick,* 4 Cal. App. 63, 72; *People* v. *Swaile,* 12 Cal. App. 192, 196). The same rule has also been followed in Arizona (*Chas. De Leon* v. *Territory of Arizona,* 9 Ariz. 161), and in Idaho as to communications between attorney and client (*State* v. *Perry,* 4 Idaho 224).

In speaking of privileged communications between husband and wife, Wigmore on Evidence, 2d ed., page 89, sec. 2336, says:

> The circumstances which will negative this implication of secrecy must of course vary with the particular case. Commonly, the

> *presence of a third person* within hearing will negative a marital confidence; * * *.

Idem, p. 98, sec. 2339, says:

> A *third person overhearing* a confidential communication may testify to it, for the same reason recognized in the privilege for a client's communications with his attorney (*ante*, § 2326).
>
> * * * * *

And sec. 2326, p. 77, idem, above cited, reads as follows:

> * * * Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.

In support of his text, Wigmore (p. 98) cites, among other cases, *Commonwealth* v. *Everson,* 123 Ky. 330, where eavesdropper testimony was admitted; *Commonwealth* v. *Wakelin,* 230 Mass. 567, dictograph record of conversation between husband and wife; and again on pp. 90–91, *Fay* v. *Guynon,* 131 Mass. 31, 33, conversation in presence of wife's sister; *Lyon* v. *Prouty,* 154 Mass. 488, 491, commu-

nication in presence of daughter; *Long* v. *Martin*, 152 Mo. 668, communications in presence of a third person; similarly *Queener* v. *Morrow*, 1 Coldw. 123, 128.

Directly in point is *State* v. *Young*, 97 N.J.L. 501, 505, wherein the court said:

> * * * But the defendant further objects to the testimony because he claims it to be a confidential communication from husband to wife, and therefore privileged. The answer to this is that it was not communicated to the wife, but to a third person, to be by him put in writing at the request of the defendant. Our statute provides, section 5 of "An act concerning evidence" (*Comp. Stat.*, p. 2222): "Nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during marriage," and under it, to establish a privilege, based on the marital relation, the communication must be confidential and made by one to the other during marriage. To commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence; nor is it a communication made by the husband to the wife. The communication to a third party under such circumstances amounts to a waiver by the husband of marital confidence such as the statute contemplates. The privilege is personal to husband and wife. "A third person who happened to overhear a personal conversation between husband and wife may be ex-

amined as to such conversation. A letter, also written confidentially by a husband to a wife, is admissible against the husband when brought into court by a third party." *Whart. Cr. Ev.*, § 398; *Commonwealth* v. *Wakelin* (*Mass.*), 120 *N.E. Rep.* 209. The instant case is much stronger, for here the husband entrusted the communication to the witness to be reduced to writing, and no such privilege as is invoked exists. 28 *R.C.L.* 527, § 116.

In *Commonwealth* v. *Everson*, 123 Ky. 330, 332–333, it was said:

> The court refused to admit the evidence of Mrs. Delara on the ground that a communication between husband and wife was confidential. While neither the husband nor wife may testify as to any communication between them, the authorities so far as we can find, are unanimous in holding that third persons may testify to communications overheard by them between husband and wife. *Bank* v. *Hutchinson*, 62 Kan. 9, 61 Pac. 443; *State* v. *Center*, 35 Vt. 379; *Allison* v. *Barrow*, 3 Cold (Tenn.) 414, 91 Am. Dec. 291; *Gannon* v. *People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *Commonwealth* v. *Griffin*, 110 Mass. 181; *Rex* v. *Simons*, 6 C. & P. 542. In the last case, Alderson, B., said: "What a person is heard saying to his wife, or even to himself, is evidence." The rules as to private communications between husband and wife is by all the authorities put on the same plane as private communications between attorney and client; and it

> has been said that if persons wish the communications they have with their attorneys to be kept secret, they should be careful not to talk in the hearing of others. 4 Wigram on Evidence, Sec. 2339; 1 Greenleaf on Evidence, Sec. 254. * * *

In *Hammons* v. *State,* 73 Ark. 495, the rule is thus stated (p. 499):

> * * * The authorities are practically agreed that when a conversation between husband and wife is overheard it may be testified to by the third party. 1 Greenleaf on Evidence, §254; *Com.* v. *Griffin,* 110 Mass. 181; *Fay* v. *Guynon,* 131 Mass. 31; *Allison* v. *Barrow (Tenn.)* 91 Am. Dec. 291; *State* v. *Center,* 35 Vt. 378; *Griffin* v. *Smith,* 45 Ind. 366.
>
> It is also held that a conversation is not privileged when made in presence of third persons. *Reynolds* v. *State,* 46 N.E. 31; *Mainard* v. *Beider,* 2 Ind. App., Sec. 183; 28 N.E. 196; Robb's Appeal, 98 Pa. 501.
>
> As the tendency of the rule is to prevent a full disclosure of the truth, it must be strictly construed. *Satterlee* v. *Bliss,* 36 Cal. 508; *Foster* v. *Hall,* 12 Pick. 98; *Gower* v. *Emery,* 18 Me. 82.

See also *Hopkins* v. *Grimshaw,* 165 U.S. 342, 351; *Tutson* v. *Holland,* 50 F. (2d) 338, 339–340; *Coles* v. *Harsch,* 129 Oreg. 11, 23; *DeLeon* v. *Territory,* 9 Ariz. 161.

There is no sound reason why petitioner should not be bound by the rule which permits third parties

to testify to communications otherwise privileged. His acquainting his stenographer with the contents of the letter necessarily negatives any intention of secrecy. Then too, the privilege rule is subject to strict construction because it prevents the discovery of evidence. Dictation to a stenographer is not the usual and ordinary way in which a husband corresponds with his wife, and the cases upon which petitioner relies holding privileged business letters so dictated are not in point, but rest upon a different principle.

CONCLUSION

Petitioner raises no question deserving of review on certiorari and, as there exists no conflict of decisions, we respectfully submit that his petition should be denied.

J. CRAWFORD BIGGS,
Solicitor General.
HARRY S. RIDGELY,
Attorney.

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